WEE CHOO KEONG

v.

KETUA PENGARAH PERKHIDMATAN AWAM, MALAYSIA

HIGH COURT MALAYA, KUALA LUMPUR
MOHD ZAWAWI SALLEH J
[JUDICIAL REVIEW NO: R2-25-321-07]
2 JUNE 2010

ADMINISTRATIVE LAW: *Exercise of administrative powers - Judicial review - Decision - Letter written by Director General of Public Services stating that Member of Parliament not entitled to pension - Applicant affected by decision - Letters constituting concluded government stance likely to infringe applicant's right - Whether constitutes a decision capable of being reviewed*

ADMINISTRATIVE LAW: *Exercise of administrative powers - Judicial review - Remedies - Certiorari and mandamus - Decision of Director General of Public Services that applicant not entitled to Member of Parliament pension due to being found guilty for contempt of court - Whether applicant was "convicted of an offence by a court of law" - Whether entitlement to pension affected - Article 48(1)(e) Federal Constitution*

CIVIL PROCEDURE: *Government proceedings - Limitation - Claim by Member of Parliament for pension - Claim filed four years and two months after alleged non-payment of pension - Whether claim statute barred - Government Proceedings Act 1956, s. 5 - Public Authorities Protection Act 1948, s. 2(a)*

CIVIL PROCEDURE: *Limitation - Government proceedings - Claim by Member of Parliament for pension - Claim filed four years and two months after alleged non-payment of pension - Whether claim statute barred - Government Proceedings Act 1956, s. 5 - Public Authorities Protection Act 1948 s. 2(a)*

CONSTITUTIONAL LAW: *Government - Proceedings against - Pensions - Claim by Member of Parliament for pension - Claim filed four years and two months after alleged non-payment of pension - Whether claim statute barred - Government Proceedings Act 1956, s. 5 - Public Authorities Protection Act 1948, s. 2(a)*

WORDS & PHRASES: *"convicted of an offence by a court of law" - Meaning of - Article 48(1)(e) Federal Constitution*

The applicant was a Member of Parliament ("MP") of Bukit Bintang Parliamentary Constituency from 21 January 1990 to 6 April 1995 ("the 1st term"). On 21 April 1995, the applicant was re-elected as MP for Bukit Bintang ("the 2nd term"). On 2 August 1995, the applicant was disqualified by the election judge under an election petition. Around 1992/1993, the applicant had written several letters of complaint to Bank Negara and spoken in Parliament concerning the alleged financial improprieties and illegalities concerning MBf Finance Bhd and MBf Holdings Bhd ("MBf companies"). The MBf companies obtained an *ex parte* injunction against the applicant. Subsequently, the MBf companies succeeded in committing the applicant to prison for two years for the breach of the said *ex parte* injunction and another two years for evasion of service of the said *ex parte* injunction ("contempt matters"). The applicant appealed against the said contempt matters. On 14 April 1995, one day before Nomination Day for the 1995 General Election, the then Supreme Court allowed the appeal against the said contempt matters and set aside the jail sentence. The Supreme Court however found the applicant in contempt of court for the complaint of evasion of service of the said *ex parte* injunction and imposed a fine of RM7,000 ("contempt fine"). On 20 June 2003, the applicant attained the age of 50 years. On 7 August 2007 the applicant *vide* letter to Pusat Pentadbiran Kerajaan Persekutuan requested for his pension. On 21 September 2007, the applicant *vide* letter to the respondent queried on the issue of pension as he received no reply despite sending two letters. On 21 September 2007 the respondent replied *vide* a letter stating that the applicant was not entitled to pension. On 30 October 2007 the applicant filed this suit seeking judicial review for an order of *certiorari* to quash the decision of the respondent in his letter dated 21 September 2007 and for an order of *mandamus* to the respondent to pay the applicant his pension as provided under the Members of Parliament (Remuneration) Act 1980 ('Act 237'). The respondent argued, *inter alia*, that: (i) the letter dated 21 July 2007 was not a decision which was susceptible to judicial review; (ii) the application was statute-barred under s. 2(a) of the Public Authorities Protection Act 1948 ('PAPA'); (iii) the applicant was not entitled to pension because the decision of the Supreme Court which had substituted

the two years imprisonment with a fine of RM7,000 was only a substitution of punishment and that the conviction still remained. Therefore, it was claimed that by virtue of the First Schedule of Act 237 at para. 14 read together with art. 48(1)(e) of the Federal Constitution ('art. 48(1)(e)'), the applicant was not entitled to pension.

Held (dismissing the application with costs):

(1) The decision which formed the basis of the judicial review application was the respondent's letter dated 21 July 2007. The applicant was affected by the decision of the respondent as contained in the letter and therefore the decision was amenable to judicial review. The courts are prepared to make a declaration when there is a concluded government stance which, if correct, is likely to infringe an applicant's right, even when there is no decision as such. (paras 29 & 30)

(2) The applicant's grant of pension fell due on 26 June 2003. Thus, his grievance against non-payment of his proposed pension started since 26 June 2003. The applicant only filed the judicial review application on 30 October 2007 which was four years and two month after the alleged non-payment of pension. The applicant's cause of action had lapsed as the cause of action of non-payment is three years under s. 5 of the Government Proceedings Act 1956. The applicant had slept on his rights and allowed more than 16 months to lapse before filing this application for judicial review. This, by itself, is in contravention of s. 2(a) of PAPA. The excuse given by the applicant for the delay was unsubstantiated. Thus, the applicant's action was clearly statute-barred. (para 36)

(3) In the context of art. 48(1)(e), the phrase "he has been convicted of an offence by a court of law" refers to a person who has been convicted of an offence by a criminal court and does not include a person who has been found guilty for contempt of court by a civil court. Further, the offence concerned must be subject to power of pardon under art. 42 of the Federal Constitution since art. 48(1)(e) says that the sentence of imprisonment or fine for the convicted offence, "has not received a free pardon." The sentence of

imprisonment or fine imposed for contempt of court's offence, in the circumstances of this case, was not subject to pardon under art. 42. (para 60)

(4) The respondent had misconstrued the law when he stated in the letter that by virtue of the provision in the First Schedule of the Act 237 at para. 14 read together with art. 48(1)(e), no pension may be given to the applicant. (para 62)

Case(s) referred to:

Allgarth Municipal Board & Ors v. Ekka Tonga Mazdoor Union & Ors AIR [1970] SC 1707 ***(refd)***

Australia Broadcasting Tribunal v. Bond [1990] HCA 331 ***(refd)***

Blue Jeans Corporation v. Amalgamated Clothing Workers of America, AFL-CIO, 275 NC 503, 507-8, 169 SE 2d 867 (1969) ***(refd)***

Council of Civil Service Union & Ors v. Minister for Civil Service [1984] 3 All ER 935 ***(refd)***

Fan Yew Teng v. Setia usaha, Dewan Ra'ayat & Ors [1975] 1 LNS 39 HC ***(refd)***

Griffin [1989] 88 Cr App R 63 ***(refd)***

Hj Hussin Hj Ali & Ors v. Datuk Hj Mohamed Yaacob & Ors & Other Cases [1983] 2 CLJ 68; [1983] CLJ (Rep) 165 FC ***(refd)***

Jayaratnam v. The Attorney-General of Singapore [1990] 3 MLJ 211 ***(refd)***

John Robertson v. United States ex rel. Wykena Watson, No. 08-6261 ***(refd)***

Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors [2009] 1 CLJ 663 FC ***(refd)***

Michael Ben Panggi v. PP [1978] 1 LNS 122 HC ***(refd)***

O'Briant v. O'Briant, 313 NC 432, 434, 329 SE 2d 370 (1985) ***(refd)***

Palmer [1992] 95 Cr. App R 170 ***(refd)***

R v. Secretary of State for Employment, ex parte Equal Opportunities Commission [1995] 1 AC I ***(refd)***

Sukhdev Singh Sodhi v. Chief Justice and Judges of PEPSU High Court [1954] SCR 545 ***(refd)***

Visiber Sdn Bhd v. Tan Meng Them & Ors [2009] 1 LNS 963 HC ***(refd)***

Legislation referred to:

Federal Constitution, arts. 42, 48(1)(e)
Government Proceedings Act 1956, s. 5
Members of Parliament (Remuneration) Act 1980, s. 8, 1st Schedule
Public Authorities Protection Act 1948, s. 2(a)
Rules of the High Court 1980, O. 18 r. 19(a)

Powers of Criminal Courts Act 1973 [UK], s. 2(1)

For the applicant - Wee Choo Keong; M/s Wee Choo Keong & Faaiz
For the respondent - Maisara Juhari (Aida Adha & Cik Haryati with her); AG's Chambers

Reported by Amutha Suppayah

JUDGMENT

Mohd Zawawi Salleh J:

Introduction

[1] This case concerns an application by the applicant for judicial review for an order of *certiorari* to quash the whole decision of the respondent in his letter dated 21 September 2007 and for an order of *mandamus* to the respondent to pay the applicant his pension after the applicant has attained the age of 50 years old on 26 June 2003 as provided under the Members of Parliament (Remuneration) Act 1980 (Act 237) with interest at 8% per annum from 26 June 2003 until realization.

[2] The application is supported by an affidavit affirmed by the applicant dated 30 October 2007.

[3] An Affidavit in opposition dated 27 November 2008 was affirmed by Yeow Chin Kiong, Director of Post Service Division of the respondent.

The Undisputed Facts

[4] The applicant is an advocate and solicitor and practicing under the name and style of M/S Wee Choo Keong & Faaiz, and was also a Member of Parliament ("MP") of Bukit Bintang Parliamentary Constituency from 21 January 1990 to 6 April 1995 ("the 1st term").

[5] On 6 April 1995, Parliament was dissolved for 1995 Parliamentary Session.

[6] On 21 April 1995, the applicant was re-elected as MP for Bukit Bintang Constituency ("the 2nd term") and on 2 August 1995, the applicant was disqualified by the election judge, YA Dato' Sri Ahmad Fairuz bin Dato' Sheikh Abdul Halim (as he then was) under an election petition filed by Dr Lee Chong Meng who lost the election for the 2nd term.

[7] In late 1992 and/or early 1993, the applicant herein, as the MP for Bukit Bintang Constituency had written several letters of complaint to Bank Negara and spoken in Parliament concerning the alleged financial improprieties, irregularities and illegalities

perpetrated by the late Tan Sri Loy Hean Heong, the then chief executive officer of the financial bodies known as MBf Finance Bhd and MBf Holdings Bhd ("MBf companies").

[8] On 7 February 1993, the applicant, as MP, lodged a police report against the late Tan Sri Loy Hean Heong's many alleged acts of impropriety, irregularity and illegality in the MBf companies. (Refer to police report in exh. "WCK1").

[9] On 9 February 1993, the MBf companies filed a suit on the ground of conspiracy to injure the said MBf companies. Two ex-employees of the MBf companies and the applicant were defendants in the said suit.

[10] On 9 December 1993, the MBf companies obtained an *Ex-Parte* Injunction in the said suit against the said defendants.

[11] On 28 January 1994, the MBf companies succeeded in committing the applicant herein to prison for two years for the breach of the said *Ex-Parte* Injunction and another two years for evasion of service of the said *Ex-Parte* Injunction ("contempt matters").

[12] The applicant appealed against the said contempt matter decision to the then Supreme Court and after hearing the appeal, judgment was reserved by the said court.

[13] On 14 April 1995, one day before Nomination Day for the 1995 General Election, the then Supreme Court delivered its judgment and unanimously allowed the appeal against the said contempt matter and set aside the jail sentence and by a majority decision of 2 to 1 found the applicant in contempt of court for the complaint of evasion of service of the said *Ex-Parte* Injunction and imposed a fine of RM7,000 ("contempt fine").

[14] The applicant paid the fine.

[15] On 20 February 1993, the applicant had applied to the High Court to set aside the said *Ex-Parte* Injunction and on 1 March 1993 to strike out the said suit. The High Court had however refused to hear the application to strike out the said suit and the setting aside the said *Ex-Parte* Injunction on the ground that the High Court had already granted leave to issue contempt proceedings.

[16] On 20 March 1993, the applicant filed the application to set aside the said *Ex-Parte* Injunction and application for leave to issue contempt proceedings. But the High Court chose to hear the application for leave to issue contempt proceedings.

[17] On 23 March 1993, the applicant's application for leave to issue contempt proceedings was heard and granted.

[18] On 6 August 1996, the applicant's application to set aside the *Ex-Parte* Injunction was heard and dismissed by the High Court.

[19] On 5 April 1997, the grounds of judgment was delivered.

[20] On 20 June 2003, the applicant attained the age of 50 years.

[21] On 20 April 2007, the Court of Appeal unanimously allowed the applicant's appeal and set aside the *Ex-Parte* Injunction and held the *Ex-Parte* Injunction was oppressive at the conclusion of the hearing of the appeal.

[22] On 20 June 2007, the said suit was struck off under O. 18 r. 19(a) Rules of the High Court 1980 by the High Court.

[23] On 7 August 2007 the applicant *vide* letter to Pusat Pentadbiran Kerajaan Persekutuan requested for his pension. (Refer exh. "WCK2B" Afidavit Menentusahkan Fakta-Fakta).

[24] On 21 September 2007, the applicant *vide* letter to the respondent queried on the issue of pension as he received no reply despite sending two letters. (Refer exh. "WCK3" Afidavit Menentusahkan Fakta-Fakta).

[25] On 21 September 2007 the respondent replied *vide* letter to the applicant informed and explained that the applicant was not entitled to pension. (Refer exh. "WCK4" Afidavit Menentusahkan Fakta-Fakta).

[26] On 30 October 2007 the applicant filed this suit herein.

The Applicant's Submission

[27] The applicant submits that the respondent was wrong in law and facts in rejecting the applicant's claim for pension on the following grounds:

(a) that the said decision was tainted in that it is contrary to the Members of Parliament (Remuneration) Act 1980;

(b) that the said decision was made in breach of the rules of procedural impropriety and/or natural justice;

(c) that in making the said decision, the respondent has acted in breach of the applicant's human and constitutional rights as a citizen of Malaysia;

(d) that in making the said decision the respondent did not take into account relevant legal and factual considerations as he was required to do; and

(e) that the said decision is irrational in view of the fact that on 12 April 2007 the Court of Appeal unanimously allowed the applicant's appeal and set aside the said *Ex-Parte* Injunction obtained by the said MBf companies on 9 February 1993 and on 20 June 2007 the Kuala Lumpur High Court had struck out with cost the said suit by the MBf companies. There was no appeal by the said MBf companies.

Respondent's Submissions

[28] The respondent submits that:

(a) The letter dated 21 July 2007 is not a decision which is susceptible to judicial review;

(b) The applicant's application is statute-barred under s. 2(a) of the Public Authorities Protection Act 1948. The respondent posits that the applicant's grant of pension would fall due on 26 June 2003, that is on the applicant 50th birthday. Thus, the applicant's grievance against non-payment of his pension would have started since 20 June 2003 after he wrote to apply for his pension on 7 August 2007 and 5 September 2007. (Refer to exh. "WCK-2A & 2B" applicant's affidavit dated 30 October 2007) which was four years and two months after the alleged non-payment of pension.

(c) The applicant is not entitled to grant of pension because the decision of the Supreme Court on 13 November 1995, which had substituted the two years imprisonment against the applicant with a fine of RM7,000 is only a substitution of punishment and that the conviction still remains. Therefore, by

virtue of the provision in the First Schedule of Act 237 at para. 14 read together with art. 48(1)(e) of the Federal Constitution, no pension may be given to the applicant who has become disqualified since 14 April 1994 and the applicant's case would fall under art. 48(1)(e) of the Federal Constitution.

Findings Of The Court

Issue (a)

[29] The decision which formed the basis of this judicial review application was the respondent's letter dated 21 July 2007. For easy reference, the letter is reproduced in full as follows:

WCK-4

Rujukan kami: JPA/PEN/AD(S)/215673
Tarikh: 21 September 2007

Wee Choo Keong
C/o Wee Choo Keong & Faaiz
Advocates & Solicitors
Business Suite 19A-14-1
Level 14, UOA Centre
No. 19 Jalan Pinang
50450 Kuala Lumpur

Tuan

Pembayaran Pencen Untuk Ahli Parlimen

Dengan segala hormatnya saya diarah merujuk kepada surat tuan bertarikh 7 Ogos 2007 mengenai perkara di atas.

2. Seperti mana tuan sedia maklum, tuan mula menjadi Ahli Parlimen Bukit Bintang dari 21 Oktober 1990 sehingga 5 April 1995. Kedudukan ini melayakkan tuan untuk menerima ganjaran dan pencen apabila Parlimen dibubarkan pada 6 April 1995. Malah tuan telahpun dibayar ganjaran sebanyak RM63,600 tetapi telah ditolak hutang yang terdiri daripada gaji terlebih bayar dan cukai pendapatan berjumlah RM80,433.38. Namun begitu, mengikut peruntukkan perenggan 2(1) Jadual Pertama Akta Ahli Parlimen (Akta 237):

> Seseorang yang berhenti menjadi Ahli atau Anggota boleh diberi pencen jika dia telah menyempurnakan 36 bulan perkhidmatan yang boleh dimasukira:

Dengan syarat bahawa jika seseorang Ahli atau Anggota untuk pertama kalinya pada atau selepas 1hb Julai 1990 berhenti menjadi Ahli atau Anggota apabila menyempurnakan tiga puluh enam bulan perkhidmatan yang boleh dimasukira tetapi belum mencapai umur lima puluh tahun pada tarikh dia berhenti menjadi Ahli atau Anggota, dia boleh diberi pencen hanya apabila dia kemudiannya mencapai umur lima puluh tahun.

Dengan itu, pencen tuan hanya boleh dibayar apabila mencapai umur 50 tahun iaitu pada 26 Jun 2003.

3. Walau bagaimanapun, Mahkamah Persekutuan pada 14 April 1995 telah mensabit kesalahan dan menjatuhkan hukuman denda sebanyak RM7,000 atas kesalahan tuan menghina mahkamah. Perkara ini telah mengakibatkan tuan hilang kelayakan untuk menerima pencen seperti mana yang telah diperuntukkan di bawah:

i) Perenggan 14, Jadual Pertama Kepada Akta 237

(1) Tiada apa-apa pencen atau ganjaran boleh diberi di bawah Jadual ini kepada mana-mana orang yang hilang kelayakan dari menjadi Ahli mana-mana satu Majlis Parlimen dalam hal-hal keadaan yang diperihalkan dalam perenggan (e) atau (f) Fasal 1 Perkara 48 Perlembagaan.

(2) Jika seseorang yang telah diberi pencen di bawah Jadual ini telah hilang kelayakan dari menjadi Ahli mana-mana satu Majlis Parlimen dalam hal-hal keadaan yang diperihalkan dalam perenggan kecil (1), pencen itu hendaklah terhenti dengan serta-merta.

Dengan syarat bahawa pencen itu hendaklah dipulihkan semula dengan kuatkuasa kebelakangan bagi seseorang yang hilang kelayakannya di bawah perenggan (e) Fasal (1) Perkara 48 Perlembagaan telah dihapuskan oleh Yang di-Pertuan Agong.

i) Perkara 48, Perlembagaan Persekutuan 1957 menyatakan:

(1) Tertakluk kepada peruntukan-peruntukan Perkara ini, seseorang adalah hilang kelayakan menjadi ahli mana-mana Majlis Parlimen jika -

...

(e) ia telah disabitkan suatu kesalahan oleh suatu mahkamah di Persekutuan (atau, sebelum hari Malaysia, di wilayah-wilayah yang terkandung dalam sesuatu Negeri-negeri Sabah atau Sarawak atau di

Singapura) dan dihukum penjara selama tempoh tidak kurang daripada satu tahun atau denda tidak kurang daripada dua ribu ringgit dan ia tidak mendapat ampun; atau

(f) Ia telah dengan sengaja memperolehi kewarnegaraan mana-mana negeri luar Persekutuan, atau telah dengan sengaja menggunakan hak-hak kewarnegaraan di suatu negeri asing atau telah membuat sesuatu akuan taat setia kepada mana-mana negeri luar Persekutuan.

4. Memandangkan sehingga kini Jabatan ini masih belum dimaklumkan mengenai apa-apa penghapusan hilang kelayakan tuan bagi maksud perenggan 14(2) Jadual Pertama kepada Akta Ahli Parlimen (Akta 237), maka Jabatan ini tidak dapat membayar kepada tuan pencen bulanan. Keputusan ini sepatutnya dimaklumkan kepada pihak tuan ketika dijatuhkan hukuman atau ketika mencapai umur 50 tahun iaitu pada 26 Jun 2003 yang lalu. Namun begitu, Jabatan ini gagal untuk berbuat demikian dan ingin memohon maaf di atas kekhilafan ini. Sebarang kesulitan yang timbul berkaitan dengan masalah ini adalah amat dikesali.

Sekian, harap maklum. Terima kasih.

"BERKHIDMAT UNTUK NEGARA"

Saya yang menurut perintah

t.t

(Anom Akmar binti Mohd Omar)
Bahagian Pencen
b.p. Ketua Pengarah Perkhidmatan Awam,
Malaysia.

[30] The respondent submits that the letter does not constitute a decision. It merely explained, *inter alia*, the reasons for non-payment of the applicant pension and the applicable provisions which disqualified the applicant from grant of pension under Act 237.

[31] The letter does not constitute an ultimate, final and operative determination of the applicant's application for grant of pension. It merely expressed opinion or statement on the applicable provision of law. The respondent has not exercised any discretion whether to grant of pension or not under para. 14 of the Schedule of the Act 237 until the respondent "dimaklumkan

mengenai apa-apa penghapusan hilang kelayakan tuan bagi maksud perenggan 14(2) Jadual Pertama kepada Akta Ahli Parlimen (Akta 237)". (See *Australia Broadcasting Tribunal v. Bond* [1990] HCA 331).

[32] With respect, I disagree. Looking at the content of the letter in its entirety, I am satisfied that the applicant would be affected by the decision of the respondent as contained in the letter and therefore the decision is amenable to judicial review. On this issue I refer to the oft-cited case of *Council of Civil Service Union & Ors v. Minister for Civil Service* [1984] 3 All ER 935 where Lord Diplock said at p. 408 as follows:

> Judicial review, now regulated by RSC, O. 53, provides the means by which judicial control of administrative action is exercised. The subject matter of every judicial review is a decision made by some person (or body of persons) whom I will call the "decision-maker" or else a refusal by him to make a decision.
>
> To qualify as subject for judicial review the decision must have consequences which affect some person (or body of person) other than the decision-maker, although it may affect him too. It must affect such other person either:
>
> (a) by altering rights or obligations of that person which are enforceable by or against him in private law; or
>
> (b) by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn. (I prefer to continue to call the kind of expectation that qualifies a decision for inclusion in class (b) a "legitimate expectation" rather than a "reasonable expectation", in order thereby to indicate that it has consequences to which effect will be given in public law, whereas an expectation or hope that some benefit or advantage would continue to be enjoyed, although it might well be entertained by a "reasonable" man, would not necessarily have such consequences …

His Lordship said further:

> For a decision to be susceptible to judicial review the decision-maker must be empowered by public law (and not merely, as in arbitration, by agreement between private parties) to make decision that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers, which have one or other of the consequences mentioned in the preceding paragraph. The ultimate source of the decision-making power is nearly always nowadays a statute or subordinate legislation made under the statute; but in the absence of any statute regulating the subject matter of the decision the source of the decision-making power may still be the common law itself, …

[33] Recent cases suggested that the court is prepared to make a declaration when there is a concluded government stance which, if correct, is likely to infringe an applicant's right, even when there is no decision as such. In *R v. Secretary of State for Employment, ex parte Equal Opportunities Commission* [1995] 1 AC I upon an enquiry from the Equal Opportunities Commission ("EOC") whether the Secretary for State was willing to introduce legislation to remove certain law which the EOC considered discriminatory, the Secretary replied that the law was not discriminatory and the provisions were justified. The EOC then applied for judicial review and sought for a declaration. The House of Lords held that there was no decision which could form the subject of a challenge by way of judicial review. Nonetheless, the court had jurisdiction to declare whether the existing legislation was discriminatory and judicial review was the appropriate procedure for the determination of that issue. Lord Keith stated:

> It is argued for the Secretary of State that O. 53 r. 1(2), which gives the court power to make declaration in Judicial review proceedings, is only applicable where one of the prerogative orders would be available under rule 1(1), and if there is no decision in respect of which one of these writs might be issued a declaration cannot be made. I consider that to be too narrow an interpretation of the court's powers.

Issue (b)

[34] Section 2(a) of the Public Authorities Protection Act 1948 says:

> Where, after the coming into force of this Act, any suit, action, prosecution or other proceedings is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law, duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall effect:
>
> > (a) The suit, action, prosecution or proceedings shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof.

[35] Thus, s. 2(a) of PAPA provides that any suit, action, prosecution or other proceeding commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority shall not lie or instituted unless:

(a) It is commenced within thirty-six months next after the act, neglect or default complained of; or

(b) In the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof.

[36] According to the fact of this instant case, the applicant's grant of pension would fall due on 26 June 2003, that is on the applicant's 50th birthday. Thus, his grievance against non-payment of his proposed pension would have started since 26 June 2003 but the applicant only filed in the judicial review application on 30 October 2007 after he wrote to apply for his pension on 7 August 2007 and 5 September 2007 (refer exh. "WCK2A & 2B" appellant's affidavit dated 30 October 2007) which was four years and two month after the alleged nonpayment of pension. In my considered opinion, the applicant's cause of action had lapsed as the cause of action of non-payment is three years under s. 5 of Government Proceedings Act 1956. The applicant had slept on his rights and the cause of action had lapsed on 26 June 2006 and allowed more than 16 months to lapse before filing this application for judicial review. This, by itself, is in contravention of s. 2(a) of the Public Authorities Protection Act 1948.

[37] In case of *Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors* [2009] 1 CLJ 663 (FC) the respondent's pleadings revealed that the claim was not one of continuous tort but related to specific acts or omissions. All the relevant events happened earlier than 1 March 1999 when the virus was isolated. The decisions made on 18 March 1999 and 19 March 1999 to cull the pigs was actually not challenged. Therefore, since the suit was filed on 20 March 2002, the action was clearly time-barred as it was filed out of time. The court stated that:

> … Regarding the issue of limitation of time, the Court of Appeal appears to interpret it as barring remedy but not the right to sue. That is not correct. In so far as PAPA is concerned the law is settled. The Privy Council in *Yew Bon Tew & Anor v. Kenderaan Bas Mara* [1983] 1 CLJ 11; [1983] CLJ (Rep) 56 held that limitation under PAPA is "just as much a "right" as any other statutory or contractual protection against a future suit …
>
> … In this respect, both the Court of Appeal and the Federal Court have consistently struck out claims when it was clear that the statute of limitations would be relied on or raised. In *Alias Ismail v. Hairuddin bin Mohamad & Anor* [1997] 4 CLJ 669 the Court of Appeal held that the court has no discretion to set aside a defence of limitation. It was open to the defendant on an application to dismiss an action as being frivolous and vexatious or an abuse of the process of the court to show the plaintiff's cause of action was statute-barred and must fail for that reason.

[See also the case of *Hj. Hussin Hj. Ali & Ors v. Datuk Hj. Mohamed Yaacob & Ors & Other Cases* [1983] 2 CLJ 68; [1983] CLJ (Rep) 165].

[38] The excuse given by the applicant for such delay for filing this application is unsubstantiated. The applicant's civil suit was disposed on November 1995. Thus, it is no excuse for the applicant to sleep on his rights and to file this application on his whims and fancy. The respondent is entitled to raise limitation of action and in the present case, the applicant's action was clearly statute-barred.

Issue (c)

[39] If I am wrong on issue (b), I will now state my opinion on issue (c).

[40] As I understand it, the respondent's stand as whether the applicant is entitled to pension or not is this: The applicant's entitlement to grant of pension and gratuity is provided under s. 8 of Members of Parliament (Remuneration) Act 1980 [Act 237], read with the provisions of the First Schedule. Section 8 provides:

> … A member shall be entitled to such pension, gratuity and other benefits as are prescribed in the First Schedule.

[41] However, proviso of para. 2 of the First Schedule to Act 237 provides that:

> Provided that where a person who becomes a Member for the first time on or after the 1st July 1990 ceases to be a Member upon completing thirty six months of reckonable service but has not attained the age of fifty years on the date he ceases to be a Member, he may be granted a pension only upon his thereafter attaining the age of fifty years.

[42] Subparagraph (2A) provides that:

> In the case of a person who becomes a Member for the first time on or after the 1st July 1990 ceases to be a Member but has not attained the age of fifty years on the date he ceases to be a Member, the salary on which a pension will be granted under subparagraph (2) shall be the last revised salary before the pension is granted to him.

[43] Thus, the applicant may be granted pension under subparagraph 2 of the First Schedule to Act 237 only upon the applicant attaining the age of fifty years, that is to say, on 26 June 2003. However, before the fall of due date for pension in 2003, the applicant was convicted for contempt of court by the High Court and sentenced to two years imprisonment. On appeal to Supreme Court, the two-years imprisonment was substituted with a fine of RM7,000. It was argued by the respondent that the Supreme Court had only substituted the punishment of imprisonment with fine and did not set aside the conviction. The conviction still remains. Therefore, by virtue of the provision in the First Schedule of Act 237 at para. 14 read together with art. 48(1)(e) of the Federal Constitution, no pension may be given to the applicant.

[44] To buttress the arguments, the respondent submits that contempt of court is a criminal in nature. (See *Visiber Sdn Bhd v. Tan Meng Them & Ors* [2009] 1 LNS 963, *Wee Choo Keong v. MBf Holdings Bhd & Anor & another appeal (supra)* (FC) p. 574; *Allgarth Municipal Board & Ors v. Ekka Tonga Mazdoor Union & Ors* AIR [1970] SC 1707).

[45] In conclusion, the respondent submits the applicant had been "convicted with an offence by court of law" within the meaning of art. 48(1)(e) of the Federal Constitution because the Supreme Court did not set aside the conviction but merely substituted the sentence.

[46] The appellant holds a contrary view. According to him, there was no conviction recorded when he was found guilty for the offence of contempt of court. The court merely made a finding of guilt and imposed the sentence because the contempt proceedings is not a criminal proceedings. Therefore, the respondent erred in law when he construed the sentence imposed as "conviction" within the meaning of art. 48(1)(e) of the Federal Constitution. Therefore, he has not become disqualified for grant of pension under Act 237 upon completion of his first term of service (21 October 1990 - 6 April 1995).

[47] I agree with the submission of the respondent that as far as classification of contempt is concerned, the contempt proceedings against the applicant was criminal contempt and not civil contempt. Criminal contempt is used to punish a person for violating a court order or express disrespect for the court. Civil contempt, on the other hand, is intended to make someone obey a court order. The purpose of criminal contempt is punishment; the purpose of civil contempt is compliance. Criminal contempt punishes behaviour that already has occurred. Civil contempt tries to effect ongoing behaviour.

[48] A major factor in determining whether a contempt is civil or criminal is the purpose for which the power is exercised. Where the primary purpose is to preserve the court's authority and to punish for disobedience of its orders, the contempt is criminal. Where the primary purpose is to provide a remedy for an injured suitor and to coerce compliance with an order, the contempt is civil. (See *Blue Jeans Corporation v. Amalgamated Clothing Workers of America*, AFL-CIO, 275 NC 503, 507-8, 169 S.E. 2d 867 (1969) (quoting 17 Am. Jur. 2f, Contempt, § 4).

[49] Criminal contempt is generally applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice. Civil contempt is a term applied where the proceeding is had to preserve the rights of private parties and to compel obedience to orders and decrees made for the benefit of such parties. (See *O'Briant v. O'Briant*, 313 NC 432, 434, 329 S.E. 2d 370 (1985)).

[50] In the case of *John Robertson v. United States ex rel. Wykena Watson*, No. 08-6261, January 2010, the Supreme Court of the United States had this to say:

> Proceedings for contempts are of two classes, – those prosecuted to preserve the power, and vindicate the dignity, of the courts, and to punish for disobedience of their orders, and those instituted to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled. The former are criminal and punitive in their nature, and the government, the courts, and the people are interested in their prosecution. The latter are civil, remedial, and coercive in their nature, and the parties chiefly in interest in their conduct and prosecution are the individuals whose private rights and remedies they were instituted to protect or enforce ... A criminal contempt involves no element of personal injury. It is directed against the power and dignity of the court, and private parties have little, if any, interest in the proceedings for its punishment.
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> *Bassette v. W.B. Conkey Com* 194 U.S. 324, 328 (1904) citations and quotations omitted).
>
> Of course, when a criminal contempt action brought to "vindicate the authority of the law" penalizes disobedience of a court order, the private order holder may "derive some incidental benefit" because the punishment imposed in the name of the sovereign "tends to prevent a repetition of the disobedience" of the order. *Gompers v. Buck's Stove & Range* Co., 221 U.S. 418, 443 (1911). This fact, however, is true of virtually any successful criminal prosecution. "It is true that the private party receives an incidental advantage from the infliction of the penalty" in a criminal contempt case, but it is the same sort of advantage which accrues to the prosecuting witness in any criminal case: "the advantage being that the punishment. ... has a tendency to prevent the repetition of the offence". Stewart Rapalje, A Treatise on contempt § 21 (1884) (citations and quotations omitted); see also *Int'l Union, United Mine Workers of Am v. Bagwell*, 512 U.S. 821, 828

> (1994) ("Most contempt sanctions, like most criminal punishments, to some extent punish a prior offense as well as coerce an offender's future obedience.") But, just as the incidental vindication of private interests does not alter the public nature of any criminal prosecution, the potential for such "indirect consequences" to flow from a criminal contempt prosecution does not alter the bedrock principle that such prosecution is necessarily on behalf of the sovereign. 221 U.S. at 443.
>
> In *Gompers v. Buck's Stove & Range Co., supra*, this court held that the determination of whether a contempt is civil or criminal rests on the "character and purpose" of the remedy imposed. 221 U.S. at 441. "If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court."

[51] In this instant case, the alleged contempt did not consist in the applicant's refusing to do any affirmative act required, but for evasion of service of a court order.

[52] The next issue to be considered is whether the applicant "has been convicted with an offence by a court of law" within the meaning of art. 48(1)(e) of the Federal Constitution.

[53] In my considered opinion, the word "convicted" or "conviction" would have to be construed in the same sense in which it was used in other legislations, say in the Criminal Procedure Code, namely "convicted" or "conviction" for a criminal offence by a criminal court. The finding of guilt for contempt of court against the appellant, in the circumstances of this case, would not disqualified him from being member of either House of Parliament and therefore by implication deprived him of pension under s. 8 of Act 237. Surely, the Constitution does not contemplate that a member of Parliament who was found guilty for contempt should be disentitled from grant of pension. (See *Fan Yew Teng v. Setia usaha, Dewan Ra'ayat & Ors* [1975] 1 LNS 39, *Michael Ben Panggi v. PP* [1978] 1 LNS 122; *Jayaratnam v. The Attorney-General of Singapore* [1990] 3 MLJ 211. All of them were convicted for offences under criminal laws by criminal courts).

[54] In England for example, a person found guilty of criminal contempt is not thereby "convicted" for the purpose of s. 2(1) of the Powers of Criminal Courts Act 1973 and cannot be placed on probation. (See *Palmer* [1992] 95 Cr. App, R. 170; [1992] 3 All ER 280).

[55] To my mind, a criminal proceedings must be controlled by the provisions of the Criminal Procedure Code. The proceedings under the contempt of courts are *sui generis* and have peculiar features which are not found in the criminal proceedings. In other words, the concept of powers, proceeding, consequences and purpose, for which the jurisdiction is exercised by a court under criminal jurisprudence, has markable distinction from the contempt jurisdiction. Proceedings for contempt of court are a peculiar nature though it may be that in certain aspects they are criminal or quasi – criminal in nature, they are not exercised as part of the original criminal jurisdiction of the court. (See *Sukhdev Singh Sodhi v. Chief Justice and Judges of PEPSU High Court 1954 SCR 545*: AIR [1954] SC 186).

[56] A useful summary of unique characteristics of criminal contempt which appear to distinguish it from other forms of criminal offence was given by Mustill LJ in *Griffin* [1989] 88 Cr. App. R 63, 67 as follows:

> In proceedings for criminal contempt there is no prosecutor, or even a requirement that a representative of the Crown or of the injured party should initiate the proceedings. The judge is entitled to proceed of his own motion. There is no summons or indictment, nor is it mandatory for any written account of the accusation made against him to be furnished to the contemnor. There is no preliminary enquiry or filtering procedure, such as a committal. Depositions are not taken. There is no jury. Nor is the system adversarial in character. The judge himself enquires into the circumstances, so far as they are not within his personal knowledge. He identifies the grounds of complaint, selects the witnesses and investigates what they have to say (subject to a right of cross-examination) decides on guilt and pronounces sentence. This summary procedure, which by its nature is to be used quickly if it is used at all, omits many of the safeguards to which an accused is ordinarily entitled, and for this reason it has been repeatedly stated that the judge should choose to adopt it only in cases of real need.

[57] In my considered opinion, burden of proof is not a major factor in determining whether a contempt proceeding is a criminal proceedings or not. This is because for both criminal and civil contempts, the burden of proof requires is beyond reasonable doubt.

[58] It is certainly correct as submitted by the respondent that the word "convicted" or "conviction" has many meanings. It can mean either the finding of guilt or the entry of a final judgment on that finding. Other meaning includes "[a] Court of conviction of error, or of compelling the admission of a truth"; "[s]tate of being convinced esp, state of being convicted of sin, or by one's conscience"; [a] strong persuasion or belief; as, to live up to one's convictions; an intensity of through conviction". (See *Webster's New International Dictionary* 584 (2nd edn. 1950).

[59] But of course susceptibility of all these meaning does not render the word "convicted" or "conviction", whenever it used, ambiguous; all but one of the meaning is ordinarily eliminated by context. The fundamental principle of statutory construction (and, indeed, of language itself) is that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.

[60] In the context of art. 48(1)(e) of the Federal Constitution, I think the phrase "he has been convicted of an offence by a court of law" refers to a person who has been convicted of an offence by a criminal court and does not include a person who has been found guilty for contempt of court by civil court. This holding is also consistent with the definition of "convicted" or "conviction" given by other statutes. For example:

> **3. Interpretation**
>
> **PU(A) 178/1993 Employees Provident Fund (Conduct And Discipline) Rules 1993**
>
> "convicted" or "conviction" includes a finding or an order involving a finding of guilt by a criminal court in Malaysia or outside Malaysia, or by a competent body conferred with the power to conduct summary investigation under any written law, that the person charged or accused has committed an offence;

3. Interpretation.

PU(A) 20/1998 Lembaga Kemajuan Wilayah Jengka Conduct And Discipline) Regulations 1998

"convicted" or "conviction" includes a finding or an order involving a finding of guilt by a criminal court in Malaysia or outside Malaysia, or by a competent body conferred with the power to conduct summary investigations under any written law, that the person charged or accused has committed an offence;

[61] It is pertinent to note that the offence concerned must be subject to power of pardon under art. 42 of the Federal Constitution since para. (e) of art. 48(1) says that the sentence of imprisonment or fine for the convicted offence, "has not received a free pardon." Is the sentence of imprisonment or fine imposed for contempt of court's offence, in the circumstances of this case, subject to pardon under art. 42. I do not think so.

[62] On this issue, I hold that the respondent had misconstrued the law when he stated in the letter that by virtue of the provision in the First Schedule of the Act 237 at para. 14 read together with art. 48(1)(e) of the Federal Constitution, no pension may be given to the applicant who he thought has become disqualified since 14 April 1995 and the applicant's case fulfils the circumstances provided under the said article.

Conclusion

[63] In view of my findings on issue (b) above, I would dismiss the application with costs. I believe, the respondent will, no doubt, exercise his own discretion as to what action he thinks fit to take, bearing in mind the court opinion on issue (c) above.